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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1420

LUTHER ALBERT JAMES - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	2– 5
Reasons for Granting the Writ	6–13
I. The Decision of the Court Below Decided a Federal Question Not in Accord With Applicable Decisions of This Court	6
II. The Holdings of the Sixth Circuit Conflicts With Those of the Circuits for the Second, Fifth, and District of Columbia	6–13
A. Comparison of the Present Case With Lucia and Pizzarello on Pleadings and Facts	7–10
B. Conflict Between the Court of Appeals for the Sixth Circuit On the One Hand and Courts of Appeal for the Second, Fifth, and District of Columbia Circuits On the Other in the Application of Principles of Law	11–13
Conclusion	14–15
Appendix A	1a
Appendix B	9a
Appendix C	10a
Appendix D	12a
Appendix E	13a
Appendix F	21a

CITATIONS

Cases:

	PAGE
Alexander v. "Americans United," Inc., ___ U. S. ___, 94 S. Ct. 2053 (1974)	13
Commissioner of Internal Revenue v. Shapiro, 499 F. 2d 257, certiorari granted, February 18, 1975	5, 7, 11, 12
Enochs v. Williams Packing and Navigation Company, 370 U. S. 1 (1962)	5, 6, 10, 12, 15
Hall v. United States (C.A. 6), 493 F. 2d 1211, certiorari granted No. 74-75	12
James v. McKeever, 73-2 U.S.T.C. ¶ 16,119 (D. Ariz. 1973)	9
Laing v. United States (C.A. 2), 406 F. 2d 853 (1974) certiorari granted No. 73-1808	12
Lucia v. United States (C.A. 5) (en banc), 474 F. 2d 565 (1973)	5, 6, 7, 8, 10, 11
Pizzarello v. United States (C.A. 2), 408 F. 2d 579, cert. denied, 396 U. S. 986 (1969)	5, 6, 7, 8, 10, 11
Rambo v. United States (C.A. 6), 492 F. 2d 1060 (1974), Petition for Certiorari Pending, No. 73-2005	12
Suarez v. Commissioner, 58 T.C. 792 (1972) finalized, 61 T.C. ___ No. 87, CCH Standard Fed. Tax Rep. ¶ 7313 (1974)	10

Statutes and Rule of Procedure:

Internal Revenue Code of 1954 (26 U.S.C.):	
Section 4401	4
Section 6862	3
Section 7421(a)	3, 5, 6, 10, 14, 15
18 U.S.C., Sections 2510(7), 2516(1) and 2517(1)	9
Rule 56(e), Federal Rules Civil Procedure	9, 10

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LUTHER ALBERT JAMES - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER, LUTHER ALBERT JAMES

Luther Albert James petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Memorandum Opinion and Order of the District Court entered April 5, 1974 (Appendix A, *infra*, pp. 1a-8a) is reported at 74-1 USTC ¶ 16,142. A clarifying Order of the District Court entered April 16, 1974 (Appendix B, *infra*, p. 9a) is not reported. The opinion of the Court of Appeals (Appendix C, *infra*, pp. 10a-11a) is reported at 510 F. 2d 860.

JURISDICTION

The judgment of the Court of Appeals (Appendix D, *infra*, p. 12a) was entered on February 12, 1975. The jurisdiction of this Court is invoked pursuant to 28 USC 1254 (1).

QUESTIONS PRESENTED

Decisions of the Courts of Appeal for the Second, Fifth, and District of Columbia Circuits have held that Section 7421 (a) of the Internal Revenue Code of 1954 does not bar injunctive relief where a tax assessment is or may be arbitrary, capricious, and excessive and without foundation in fact.

Did the Court of Appeals for the Sixth Circuit, by refusing (a) to grant injunctive relief, or, (b) in the alternative, requiring the District Court to hold an evidentiary hearing on a jeopardy assessment made by IRS under 26 USC 4401, err in declining to follow the precedents established in the Second, Fifth, and District of Columbia Circuits, on similar allegations and facts?

STATUTES INVOLVED

The pertinent provisions of Sections 4401, 6201, 6301, 6331, 6862, and 7421 of the Internal Revenue Code of 1954 (26 USC) and 18 USC Sections 2510(7), 2516 (1) and 2517 (1) are set forth in Appendix E, *infra*, pp. 13a-2.

STATEMENT OF THE CASE

On November 9, 1972, the Internal Revenue Service ("IRS"), using the jeopardy assessment procedure under 26 USC Section 6862, assessed a wagering tax liability against Petitioner pursuant to 26 USC Section 4401 for the period July 1, 1968-September 30, 1972 in the amount of One Million Forty-Seven Thousand Two Hundred Thirty Dollars and Thirty-Six Cents ($1,047,230.36). The government initially offered no explanation as to the basis for the assessment. On the following day, pursuant to the jeopardy assessment, IRS levied against and seized properties owned by and belonging to Petitioner.

Petitioner was later informed by an IRS "30-day letter" that the jeopardy assessment was based on the assumption that he had received an average of Seven Thousand Dollars ($7,000.00) per day as a result of engaging in the business of accepting wagers over a period of fifty-one (51) months. The original assessment of $1,047,230.36 was apparently based on the further assumption that Petitioner was engaged in wagering activities for each of seven (7) days during each week during the entire 4⅓ year period of assessment. IRS later changed the amount of the original assessment by its "30-day letter" which was based on the further assumption that Petitioner did not take bets on Sundays during said period, thereby decreasing the original assessment to Nine Hundred Twenty-Nine Thousand Six Hundred Dollars ($929,600.00).

On March 2, 1973, Petitioner filed a Verified Complaint in the United States District Court for the Western District of Kentucky, asking that the $929,-600.00 assessment be declared null and void and unenforceable and stricken from the records of IRS.

Petitioner later filed an Amended Verified Complaint in which he stated that the wagering tax liability assessed by the IRS was the result of a projection for the entire period based on either: (1) no information whatsoever; (2) information illegally obtained; or (3) unfounded conjecture of the extent of wagering activities based on information concerning at most two days during the entire 1328 day period of time. Petitioner also stated that the assessment was excessive, arbitrary, capricious, and was an abuse of discretion and without factual foundation. He alleged that he did not admit that he was engaged in wagering activities during any of the period which was the subject of the assessment and stated that he did not admit he was liable for any tax under 26 USC 4401.

Petitioner further alleged that he did not have the resources to pay the assessment and could not do so, and would, therefore, be immediately and irreparably injured by the actions of IRS which would violate his Constitutional rights and would result in his bankruptcy. Petitioner asked the Court for a permanent injunction to stop all levies and seizures of his properties.

On motion of the government, the District Court on July 10, 1974, without an evidentiary hearing, entered Summary Judgment for IRS and incorporated

its Memorandum Opinion and Order entered on April 5, 1974 refusing to enjoin the assessment. Petitioner thereupon appealed the District Court's final ruling.

In a two page per curiam Opinion, the Court of Appeals (Appendix C, *infra,* pp. 10a-11a) affirmed the District Court opinion which declined to follow the Fifth Circuit case of *Lucia* v. *United States* (en banc), 474 F. 2d 565 (1973), and the Second Circuit case of *Pizzarello* v. *United States,* 408 F. 2d 579, *cert. denied,* 396 U. S. 986 (1969), without distinguishing those cases from the present case. The Circuit Court commented, that while Petitioner had made a strong argument that the projection upon which the assessment was based was unrealistic and was an exaction in the guise of a tax, the Court felt that Petitioner had not come within the exception to the so-called anti-injunction statute (26 USC 7421 (a)) enunciated by this Court in *Enochs* v. *Williams Packing and Navigation Company,* 370 U. S. 1 (1962), and that relief was therefore precluded.

It is the position of Petitioner, Luther Albert James, that the decisions in *Lucia* v. *United States, supra,* and *Pizzarello* v. *United States, supra,* are indistinguishable from the present case on their facts and principles and that the Sixth Circuit decision below is in direct conflict not only with those decisions but also with the recent case from the Court of Appeals for the District of Columbia Circuit of *Commissioner of Internal Revenue* v. *Shapiro,* 499 F. 2d 257, *cert. granted,* February 18, 1975.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court Below Decided a Federal Question Not in Accord With Applicable Decisions of This Court.

The decision below is in direct conflict with the principles established by this Court in *Enochs* v. *Williams Packing and Navigation Company, supra.* In the *Enochs* case, this Court ruled that the anti-injunction provision of the Internal Revenue Code, Section 7421(a), can be overridden when it is clear that "under no circumstances" can the government prevail in its tax determination and when the traditional requisite of equity jurisdiction (the inadequacy of a remedy at law) otherwise exists. This Court, in *Enochs,* said that Section 7421(a) doesn't apply when the assessment is an "exaction in the guise of a tax", the justiciable question being ultimately whether the government has demonstrated "good faith" in making the assessment.

The decision below, in adhering to an inflexible application of Section 7421(a), also conflicts with the ruling of the Second and Fifth Circuits in *Lucia* and *Pizzarello*, respectively, which recognize that judgment as to when the exception to 7421(a) applies must be exercised in light of the facts of each particular case.

II. The Holding of the Sixth Circuit Conflicts With Those of the Circuits for the Second, Fifth, and District of Columbia.

The decision below is in direct conflict with the principles established by Circuit Court decisions in *Pizzarello* v. *United States, supra,* from the Second Circuit, *Lucia* v. *United States, supra,* from the Fifth

Circuit, and *Commissioner of Internal Revenue* v. *Shapiro, supra,* from the District of Columbia Court of Appeals.

A. Comparison of the Present Case With *Lucia* and *Pizzarello* on Pleadings and Facts.

The taxpayers in *Lucia* and *Pizzarello,* as well as Petitioner in the present case, were all faced with a jeopardy assessment for collection of wagering excise taxes. Thus, each of the taxpayers in these cases were denied the formal procedural remedies enjoyed by income, estate and gift taxpayers, that of being allowed to petition in the United States Tax Court and thus to avoid ruinous levies during the pendency of litigating a refund claim. Each of the taxpayers was, and Petitioner, James, is, faced with either (a) paying the entire tax and facing the impermissible Fifth Amendment perils to sustain the burden of proof in a subsequent refund suit, or (b) paying a segregated part of the tax and facing successive and ruinous levies during his action for refund, or (c) forfeiting the tax no matter how excessive, capricious, and arbitrary or (d) doing nothing and suffering the consequences of collection, levy and seizure.

There is no significant distinction between either the facts or principles of the case at bar as compared with those of *Lucia* and *Pizzarello.*

In *Pizzarello,* the taxpayer attacked the assessment for alleged wagering taxes on the basis that the assessment was: (a) excessive and arbitrary, and (b) as illegal, due to its foundation being based on unlawfully

obtained evidence. *Pizzarello* contended that if the government was permitted to levy upon and seize his property he would suffer immediate and irreparable damage for which he had no adequate remedy at law; that to allow the government to defeat the action for an injunction would promote an indirect forfeiture under the guise of a jeopardy assessment. The government assessment in *Pizzarello* was based on admissible evidence that he was engaged in gambling over a three day period. The government attempted to show information that *Pizzarello* was engaged in gambling on more than three days, but the Court held that such information could not be considered since it was evidence illegally obtained. The Second Circuit held that the assessment was arbitrary, excessive, and without factual foundation since it was based on *admissible evidence* of only three days activities coupled with an unrealistic projection to arrive at the total assessment.

In *Lucia,* the taxpayer made the same claim for injunctive relief, contending that an assessment based on a projection from admissible evidence of one day's wages over a period of almost fifty-seven months was arbitrary, capricious, and excessive, and that the Court should be free of the constraint of the anti-injunction statute in such case.

Petitioner, herein, like *Lucia* and *Pizzarello,* alleged the assessment was arbitrary and excessive and that it would result in his financial ruin unless enjoined; he specifically pled that he did not admit he owed any tax.

In the present case, the government filed affidavits in the District Court in support of a Motion for Summary Judgment which set out the alleged basis for the assessment against Petitioner. The government relied almost entirely upon an affidavit prepared by FBI agent Anthony Adamski, Jr. purportedly from information he overheard as a result of a criminal investigation wiretap conducted from May 11, 1972-May 19, 1972. The information in the Adamski affidavit, as well as other affidavits filed by the government, consisted primarily of conclusory and hearsay statements which, pursuant to Rule 56(e) of the Federal Rules of Civil Procedure (Appendix F, *infra,* p. 21a), are inadmissible to support a Motion for Summary Judgment. Petitioner made appropriate objections to the affidavits in the District Court.

Petitioner demonstrated to the District and Circuit Courts below that not only does the wiretap affidavit fail to prove his involvment in the business of accepting wagers, even if it did, IRS is not authorized to receive such information pursuant to 18 USC, Sections 2510(7), 2516(1) and 2517(1). See *James* v. *McKeever,* 73—2 USTC ¶ 16,119 (D. Ariz. 1973). Should Petitioner be given the benefit of an evidentiary hearing in the District Court, he contends that he could show that the *conclusions* contained in the FBI agent's affidavit are not supported by the telephonic conversations, and, further, that even the *conclusions of the FBI agent* in the affidavit (as the District Court observed, Appendix A, *infra,* p. 7a) do not indicate the Petitioner was connected with accepting wagers on more than two days of the investigation period. The government does not pretend that it has any admissible factual basis for concluding that Petitioner was engaged in wagering activ-

ities for any of the rest of the 1328 days of the assessment period. In its Opinion, the District Court agreed with Petitioner that certain of the information contained in the government's affidavits in support of its Motion for Summary Judgment were "in clear violation of the requirements set out in Rule 56(e), Federal Rules of (Civil) Procedure, inasmuch as they are based upon hearsay and not upon the personal knowledge of the affiant" (Appendix A, *infra,* p. 8a).

The District Court erroneously disregarded the requirements of Rule 56(e), on the rationale that irrespective of the integrity of the government's assessment, it was the taxpayer who had the burden of proving that he was not engaged in the business of accepting wagers and that the assessment was invalid. This misconception arises from the fact that a tax assessment normally imposes a burden of proof upon the taxpayer to go forward and show that he is not liable for the tax assessed. However, this is not at all the case when the tax assessment is so totally lacking in integrity that it amounts to no more than an "exaction in the guise of a tax". This is the true effect of the *Enochs* holding and has been supported, at least by inference, in *Lucia* v. *United States, supra,* and *Pizzarello* v. *United States, supra,* as well as in *Suarez* v. *Commissioner,* 58 T.C. 792 (1972), *finalized,* 61 T.C. —— No.87, CCH Standard Fed. Tax Rep., ¶ 7313 (March 1974). The District Court and Circuit Court below should have found that the government's assessment was so lacking in factual foundation that it was not entitled to be treated as an assessment for purposes of burden of proof or application of Section 7421(a).

B. Conflict Between the Court of Appeals For the Sixth Circuit on the One Hand and Courts of Appeal For the Second, Fifth, and District of Columbia Circuits on the Other in the Application of Principles of Law.

On the facts presented there, the Second Circuit, in *Pizzarello,* entered an injunction in favor of the taxpayer on the grounds that the assessment was solely or in part based on illegally obtained evidence and on the further ground that an assessment for a five year period based on evidence of three days' activities is arbitrary, excessive and without factual foundation. In *Lucia,* the Fifth Circuit remanded the case to the District Court for an evidentiary hearing to determine whether the government had made a realistic projection from the admissible evidence which it possessed, or, whether it had "merely derived, Mandrake—like (a calculation), from a filament of evidence and subjected (it) to a sleight of hand computation." 474 F. 2d at 575.

In the *Shapiro* case, *supra,* the Court of Appeals for the District of Columbia remanded to the District Court to obtain some evidence by which to judge whether the asserted deficiency was indeed a tax, or, on the other hand, was so arbitrary and excessive as to be termed "an exaction in the guise of a tax". The Court also held that if the District Court were to find that no factual foundation existed for the IRS actions or that the amount of the asserted deficiency was totally excessive, then the Court could enjoin the jeopardy assessment and levy, on the explicit authority of *Lucia* and *Pizzarello.*

In view of the amazingly similar principles of law enunciated by this Court in *Enochs,* and the Courts of Appeal for the Second, Fifth and District of Columbia Circuits, there is no legitimate reason why Petitioner, Luther Albert James, as a resident of the Sixth Circuit, should not be afforded the same protection and treated in exactly the same way and manner under the same Federal laws as residents of other Circuits. Principles of justice and equality with respect to the implementation of a Federal tax law should apply and remain the same throughout each and every one of the United States and territories.

Neither the District Court nor the Court of Appeals for the Sixth Circuit, in the present case, specifically gave any reason for failing to follow the decisions of the Second and Fifth Circuits. The *Shapiro* case was not cited as authority to either the District or Circuit Court below and was not mentioned in the opinion of either.

This Court, in addition to granting certiorari in the *Shapiro* case, has also granted certiorari in the case of *Hall* v. *United States,* No. 74-75, and *Laing* v. *United States,* No. 73-1808, both of which cases involve the propriety of jeopardy assessment procedures against "terminated year" taxpayers. In *Rambo* v. *United States,* 492 F. 2d 1060 (1974), Petition for Certiorari pending, No. 73-2005, IRS levied against and seized the taxpayer's property and did not send him a deficiency notice. IRS asserted that a person against whom a short year jeopardy assessment was levied was not entitled to such notice. The Court of Appeals for the Sixth Circuit, in affirming the grant of injunctive

relief to a taxpayer summarily assessed pursuant to a "termination of year" jeopardy assessment, stated:

> "A system that permits the government to seize and sell property without affording the taxpayer any opportunity for a judicial determination of the validity of the tax prior to the payment could very well raise a serious question of a denial to the taxpayer of his property without due process of law."

Mr. Justice Blackmun, dissenting in *Alexander* v. *"Americans United," Inc.,* —— U. S. ——, 94 S. Ct. 2053 (1974), also touched on this problem when he pointed out that citizens must be protected from the "overwhelming power of the IRS".

CONCLUSION

Because a direct conflict has now been created between the Court of Appeals for the Sixth Circuit and other Circuit Courts of Appeal, it is imperative and necessary that guidelines be established to resolve these points in order to insure an equal taxing procedure among all citizens, while at the same time guaranteeing basic protection of taxpayers from harassment and ruin by the government. It is submitted that there is palpably involved in these cases the broader question of the extent to which the collection apparatus of the IRS should be used as an instrument of social reform rather than restricted to the chartered purposes of collection of taxes lawfully owed. More than abstract principles of fair play and equal justice are involved. Our self-assessment system will work only so long as tax administration is even handed.

The anti-injunction provisions of the Internal Revenue Code are intended to prevent the delay of collection efforts pursuant to "good faith" assessments and not as a shield of immunity for arbitrary and capricious confiscation. It is apparent in the conflict among the different Circuit Courts of Appeal in the instant case that a definite need exists for this Court to establish the standards of "good faith" to be applied equally among all citizens.

The Courts of Appeal for the Second, Fifth and District of Columbia Circuits have declined to apply a completely inflexible rule with respect to 26 USC, Section 7421(a) and, in following this Court's holding in

Enochs, have concluded that the government must exercise some degree of good faith in having a factual foundation to support an assessment before the burden of the assessment can be thrust upon the taxpayer. The rationale of those cases is simply that if the assessment is so factually deficient that the government will not prevail, it is not a true tax under the revenue laws and does not impose any of the normal presumptions nor create any of the normal burdens of proof as in the case of other assessments. It is therefore not subject to the provisions of Section 7421(a).

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

LUTHER ALBERT JAMES,
Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,
Defendants.

CIVIL ACTION No. 7600-A

MEMORANDUM OPINION AND ORDER

This action is pending before the Court on the motion of the defendants for summary judgment and the motion of the plaintiff for a preliminary injunction. No evidentiary hearing has been held up to this time, the Government contending that the Court's only recourse is to dismiss the complaint or to enter summary judgment in its favor without a hearing.

The pleadings, the affidavits and the papers on record reflect that on November 9, 1972, the Internal Revenue Service, hereinafter referred to as I.R.S., made a jeopardy assessment against the plaintiff for unpaid wagering excise taxes for the period July 1, 1968 through September 30, 1972, in the amount of $929,600. Affidavits filed by the Government reveal that the jeopardy assessment was based on findings made by James D. Morgan, an Agent of the I.R.S.

Morgan, in his affidavit filed in support of the motion for summary judgment, relies on a 51 page affidavit of an

F.B.I. Agent which stated that wire taps from May 11, 1972 through May 19, 1972 intercepted telephone calls placing an average of more than $7,000 in gross wagers per day. The tax assessment, Mr. Morgan states, was based upon gross daily wagers of $7,000 for each day from July 1, 1968 through September 30, 1972, excepting Sundays.

On November 2, 1973, the plaintiff and various other defendants in Criminal Action No. 27,962 changed their plea from not guilty to guilty as to Count II of the indictment, which was the conspiracy count charging the defendants in that case with a conspiracy to violate the gambling laws of the United States, to wit: 18 U.S.C. § 1955. Subequently, the Court received a formal plea of guilty from plaintiff and sentenced him in accordance with that plea of guilty as to Count II of the indictment.

Plaintiff has brought this suit alleging that the assessment of $929,600 was arbitrary, capricious and unfounded and made as part of a scheme to coerce him into waving his Fifth Amendment rights, and in violation of the Due Process Clause of the Fifth Amendment.

It is further alleged by the plaintiff that the assessment was made by the Government on the basis of no information whatever, or on the basis of information illegally obtained, or on an unfounded conjecture of the extent of wagering activities, not excluding one day, during a period of 1,327 days.

It is further alleged that the assessment is excessive, arbitrary, capricious and without factual foundation.

Other pertinent allegations found in the amended complaint are that the plaintiff does not admit that he engaged in wagering activities during any of the assessment period, and does not have the resources to pay the assessment and cannot do so. It should be noted that plaintiff, in his original complaint, which was sworn to by him, made no allegation that he was not engaged in wagering, and stated that

the Government had no factual foundation to support the inferences that he was so engaged. In his amended complaint, which is not verified, he does state that he does not admit that he was engaged in wagering activities during the applicable period.

The Government relies upon 26 U.S.C. § 7421(a) as grounds for upholding its motion. That statute, insofar as relevant, provides:

> ". . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

The most recent Supreme Court interpretation of the statute occurred in *Enochs* v. *Williams Packing & Navigation Company, Inc.*, 370 U.S. 1, 82 S. Ct. 1125, 8 L.E. 2d 292 (1962), where Mr. Chief Justice Warren stated that it is proper to enjoin an attempted tax collection where it is clear that under no circumstances could the Government ultimately prevail and where equity jurisdiction otherwise exists. The question of whether the Government has a chance of ultimately prevailing is to be determined under the most liberal view of the law and facts. *Enochs*, supra, 370 U.S. at p. 7, 82 S. Ct. at p. 1129.

The Sixth Circuit's most recent decision construing the statute is that of *Trent* v. *United States*, 442 F. 2d 405 (1971). There the I.R.S. levied assessments and penalties against the properties of the appellants for failure to pay wagering excise taxes in excess of $50,000. Appellants sought an injunction against the collection procedures and the convening of a three-judge district court. A three-judge court was convened but dissolved itself and the District Judge dismissed the case on the grounds that injunctive relief was barred by the statute.

The Court of Appeals, in affirming, held that even though two of the appellants had asserted they were not in the wagering business at all, they were not entitled to an evidentiary hearing or to an injunction. The court held that "[t]o hold an evidentiary hearing at this point would be to circumvent the long-standing procedure, mandated by the Congress and upheld by the courts, for litigating the merits of these cases."

In *Cole* v. *Cardoza*, 441 F. 2d 1337 (6th Cir. 1971), appellants brought suit requesting the district court to declare that wagering assessment taxes totalling $14,744.58 were illegal, and asking the court to enjoin their collection and to order their refund.

The district court sustained the motion of the District Director to dismiss and the Sixth Circuit affirmed, although there appeared in the appellants' pleadings many allegations which are found in the plaintiff's pleadings in the instant case. Appellants, in *Cole*, alleged among other things that the assessments were arbitrary and capricious and not based upon records of any kind or upon reliable information.

Reliance was also had upon the contention that the assessments violated appellants' Fifth Amendment privileges against self-incrimination and amounted to Bills of Attainder.

In affirming, the Sixth Circuit overruled both the Fifth Amendment contentions of the appellants, and their arguments that the assessments were illegal because they were arbitrary and capricious and not based upon reliable information. The Sixth Circuit's determination with regards to the first of the two contentions is borne out by the Fifth Circuit in *Lucia* v. *United States*, 474 F. 2d 565. See, also *White* v. *Cardoza*, Civil Action No. 74-70528, (E.D. Mich. December 26, 1973) and *Ianelli* v. *Long*, Civil Action No. 74-1418 (3rd Cir. June 29, 1973).

With regards to the arbitrary and capricious argument Judge Peck, speaking for the court, stated that appellants must set forth well pleaded facts under which the district court could conclude that the assessments were only in the guise of a tax, and that they had failed to do so and only stated conclusions that the assessments were arbitrary and capricious.

Plaintiff relies heavily upon the Fifth Circuit holding in *Lucia* v. *United States*, *supra*, and the Second Circuit decision in *Pizzarello* v. *United States*, 408 F. 2d 579 (2nd Cir. 1969). In *Lucia* the Fifth Circuit, sitting en banc, held that the taxpayer was entitled to a hearing on the basis of his allegations that the Government's assessment was arbitrary, capricious and without factual foundation. In *Lucia* an assessment was made of $2,653,640, plus interest, for unpaid wagering taxes. The assessment was made on the basis of a seizure of one day's betting slips which indicated a total of $28,780 in bets accepted for that day. The agent then determined that the one day constituted a representative day, and went on to compute, on the basis of a six day week, the total annual gross wagers to be $5,612,100.

The Fifth Circuit, on p. 575, stated that the trial court would have to determine at a hearing whether the computative basis used by the agent was so insufficient as to make the assessment "an exaction in the guise of a tax" rather than a legitimate tax on wagers. The court pointed oue that serious questions might be involved as to whether the Government's figures were realistic or merely derived from a filament of evidence, and subjected to a "sleight-of-hand" computation.

The Fifth Circuit went onto hold that if Lucia could show that the assessment was "an exaction in the guise of a tax", he would also have to prove the possibility of a financially runinous levy during the pendency of a refund proceeding. By way of explanation, the court stated that

if Lucia could show that he would have suffered bankruptcy as a result of the levy, and that the assessment was arbitrary, then he would be entitled to relief.

The force of *Lucia* is somewhat weakened by a dissenting, in part, and concurring, in part, opinion of five of the Fifth Circuit Judges, wherein it is pointed out that the Fifth Circuit had previously held in *Pinder* v. *United States,* 330 F. 2d 119 (5th Cir. 1964) and *Mersel* v. *United States,* 420 F. 2d 516 (6th Cir. 1970) that the Government could use evidence, based on a very short period of time, of income received by the taxpayers as a basis for projecting his income over a much longer period of time.

Ianelli v. *Long,* supra, is the case relied upon by the Fifth Circuit in *Lucia.* There a wagering tax of $282,440.70 was involved. The affidavit of the District Director explained that a revenue agent of the I.R.S. computed the wagers for a period of five years, exclusive of Sundays, by using the average of wagers accepted on three consecutive days during the period.

The Second Circuit held that there was no proof that Ianelli operated as a gambler for five years, or even if he did so operate, that the three day average represented his average daily business for the other 1,575 days. The conclusion was reached that the assessment was excessive, arbitrary and without factual foundation, and that the final burden imposed by the levies might result in irreparable injury, since Ianelli's assets were obviously insufficient to cover the taxes.

It is the opinion of this Court that the Sixth Circuit has taken a more restrictive view of 26 U.S.C. § 7421(a) than has the Second Circuit and the Fifth Circuit, even though the Sixth Circuit has not expressly passed upon a factual situation such as confronts the Court here. This Court, therefore, believes that under the circumstances, in the case at bar, where the plaintiff has been found guilty

of a conspiracy to engage in the gambling business for the period July 1, 1968 through September 30, 1972, and where the Government has introduced an affidavit to the effect that the taxpayer received at least $7,000 per day on two days during the taxable period, that the taxpayer is not entitled to injunctive relief. The Court is convinced that, under the circumstances, the Government may prevail in its claim that the assessment is valid, as is required by the holding in *Enochs* v. *Williams Packing & Navigation Company, Inc.,* supra.

The Court's opinion is enforced by District Judge Shelbourne's opinion in *Lassoff* v. *Gray,* 207 F. Supp. 843 (W.D. Ky. 1962) following a remand to him by the Sixth Circuit found in 266 F. 2d 745. In *Lassoff,* Judge Shelbourne held that an assessment of $300,264.46 against the plaintiffs was invalid and illegal, because obtained by a defective search warrant, and since the defendant had failed to produce any witness to give admissible evidence that the plaintiffs were engaged in accepting wagers. Judge Shelbourne went on to hold that the plaintiffs introduced no proof that the collection of the assessment would result in the forced sale or ruination of any business or the loss of intangible assets, and, therefore, he held that plaintiffs could file suit for refund and this constituted an adequate remedy at law.

However, in a subsequent opinion, Judge Shelbourne held that his previous conclusion that there was no admissible evidence that the taxpayers were engaged in the business of accepting wagers had to yield to his present conclusion mandated by the recent case of *Enochs,* that under the most liberal view of the law and the facts, and from the information available at the time the suits were filed, it was not clear that the Government could not ultimately prevail. As stated by Judge Shelbourne, the plaintiffs had not offered any credible evidence to show that they were not engaged in the business of accepting wagers, and therefore

plaintiffs had not met the burden of overcoming the presumption that the assessment was legal and valid.

In light of *Trent*, *Cole* and *Lassoff*, this Court respectfully declines to follow *Ianelli* and *Lucia*, and concludes that the motion of defendants for summary judgment should be sustained. In reaching this conclusion, the Court is cognizant of the fact that certain of the affidavits filed by the Government are in clear violation of the requirements set out in Rule 56(e), Federal Rules of Criminal Procedure, inasmuch as they are based upon hearsay and not upon the personal knowledge of the affiant. However, as stated before, the burden is upon the taxpayer to offer credible evidence that the assessment is illegal and invalid, and to show that he was not engaged in the business of accepting wagers.

The Court does not believe plaintiff has shown by credible evidence that he was not engaged in the business of accepting wagers, and does not accept his counsel's argument that his entry of a guilty plea is not admissible against him in this civil proceeding, under the teachings of *North Carolina* v. *Alford*, 400 U.S. 25 (1970), and pursuant to a statement made by his counsel to District Judge Rhodes Bratcher, at the time when the plea was changed from not guilty to guilty.

In conclusion, It is Ordered that the motion of the defendants for summary judgment be and it is hereby sustained, and the motion of plaintiff for a preliminary injunction is hereby overruled.

This is a final and appealable order, and there is no just cause for delay.

Dated April 5, 1974

(s) Charles M. Allen
United States District Judge

cc: Counsel of Record

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Luther Albert James,
Plaintiff,

v.

United States of America, Et Al.,
Defendants.

CIVIL ACTION # 7600-A

ORDER

It has been brought to the Court's attention that there are two clerical errors in the Opinion entered April 5, 1974. On page 6, line 10, and again on page 8, line 5, the Court inadvertantly referred to the "Ianelli case" whereas the correct reference should have been to the Pizzarello case, Pizzarello v. United States, 408 F. 2d 579 (C.A. 2, 1969). This mistake has no bearing on the Court's findings of fact and conclusions of law.

It Is the Order of the Court that the Opinion and Order entered in this case on April 5, 1974, be changed in accordance with the above discussion.

April 16, 1974.

(s) Charles M. Allen
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 74-1867

LUTHER ALBERT JAMES,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed February 12, 1975.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and McCREE, Circuit Judges.

PER CURIAM. This is an appeal from summary judgment in favor of the Government in an action to enjoin the assessment or collection of wagering taxes that the Government claims appellant owes. A jeopardy tax assessment was made, and the complaint sought an injunction to restrain the collection of the tax. District Judge Charles M. Allen entered summary judgment denying the application for injunctive relief.

The complaint alleged that the assessment was made without any basis whatsoever and that the justification asserted by the Government for the assessment was based upon information illegally obtained through the unlawful disclosure of the contents of a wiretap. The Government relies upon 26 U.S.C. § 7421(a), which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . . ."

In *Enochs* v. *Williams Packing & Navigation Co.*, 370 U. S. 1 (1962), the Supreme Court held that an attempted tax collection can be enjoined only when it is clear that under no circumstances could the Government ultimately prevail and when equity jurisdiction otherwise requires injunctive relief.

The District Court followed the decisions of this court in *Trent* v. *United States*, 442 F. 2d 405 (1971), and in *Cole* v. *Cardoza*, 441 F. 2d 1337 (1971). It declined to follow a Fifth Circuit case, *Lucia* v. *United States*, 474 F. 2d 565 (1973), and a Second Circuit case, *Pizzarello* v. *United States*, 408 F. 2d 579. *cert. denied*, 396 U. S. 986 (1969), that carved out further exceptions to the statute.

Although appellant makes a strong argument questioning the projections as unrealistic, and branding the assessments as an exaction in the guise of a tax, we conclude here, as we held in the two precedents cited above, that the statute means what it says and that appellant has not succeeded in bringing his case within the exception enunciated by the Supreme Court in *Enochs, supra.*

Affirmed.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 74-1867

LUTHER ALBERT JAMES, - - *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, - *Defendant-Appellee.*

JUDGMENT

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT
(s) JOHN P. HEHMAN, *Clerk*

Issued as Mandate: March 14, 1975
COSTS: Awarded to Appellee

Filing fee	$——
Printing	$81.50
Total	$81.50

APPENDIX E

INTERNAL REVENUE CODE OF 1954 (26 U.S.C.)

Section 4401. Imposition of Tax.

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter [§§ 4401-4405 of this title], all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter [§§ 4401-4405 of this title] has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter [§§ 4401-4405 of this title] on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter [§§ 4401-4405 of this title] on all wagers placed in such pool or lottery. (Aug. 16, 1954, c. 736, 68A Stat. 525.)

* * * * * * *

Section 6201. Assessment Authority.

(a) Authority of secretary or delegate.—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing

under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) Taxes Shown on Return.—The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title.

(2) Unpaid Taxes Payable by Stamp.—

(A) Omitted stamps.—Whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale or use by the manufacturer thereof or whenever any transaction or act upon which a tax is required to be paid by means of a stamp occurs without the use of the proper stamp, it shall be the duty of the Secretary or his delegate, upon such information as he can obtain, to estimate the amount of tax which has been omitted to be paid and to make assessment therefor upon the person or persons the Secretary or his delegate determines to be liable for such tax.

(B) Check or money order not duly paid.—In any case in which a check or money order received under authority of section 6311 as payment for stamps is not duly paid, the unpaid amount may be immediately assessed as if it were a tax imposed by this title, due at the time of such receipt, from the person who tendered such check or money order.

(3) Erroneous Income Tax Prepayment Credits.—If on any return or claim for refund of income taxes under subtitle A [§§ 1-1552 of this title] there is an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax, the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary or his delegate in the same manner as in the case of a mathematical error appearing upon the return.

(b) Estimated income tax.—No unpaid amount of estimated tax under section 6153 or 6154 shall be assessed.

(c) Compensation of child.—Any income tax under chapter 1 [§§ 1-1361 of this title] assessed against a child, to the extent attributable to amounts includible in the gross income of the child, and not of the parent, solely by reason of section 73 (a), shall, if not paid by the child, for all purposes be considered as having also been properly assessed against the parent.

(d) Deficiency proceedings.—For special rules applicable to deficiencies of income, estate, and gift taxes, see subchapter B [§§ 6211-6216 of this title]. (Aug. 16, 1954, c. 736, 68A Stat. 767.)

* * * * * * *

Section 6301. Collection Authority.

The Secretary or his delegate shall collect the taxes imposed by the internal revenue laws. (Aug. 16, 1954, c. 736, 68A Stat. 775.)

* * * * * * *

6331. Levy and Distraint.

(a) Authority of secretary or delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter [§§ 6301-6344 of this title] for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as

defined in section 3401 (d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property.—The term "levy" as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) Successive seizures.—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

(d) Cross references.—(1) For provisions relating to jeopardy, see subchapter A of chapter 70 [§§ 6851-6864 of this title].

(2) For proceedings applicable to sale of seized property, see section 6335. (Aug. 16, 1954, c. 736, 68A Stat. 783.)

* * * * * * *

6862. Jeopardy Assessment of Taxes Other Than Income, Estate, and Gift Taxes.

(a) Immediate assessment.—If the Secretary or his delegate believes that the collection of any tax (other than income tax, estate tax, and gift tax) under any provision of the internal revenue laws will be jeopardized by delay, he shall, whether or not the time otherwise prescribed by law for making return and paying such tax has expired, immediately assess such tax (together with all interest, additional amounts, and additions to the tax provided for by law). Such tax, additions to the tax, and interest shall thereupon become immediately due and payable, and immediate notice and remand shall be made by the Secretary or his delegate for the payment thereof.

(b) Immediate levy.—For provision permitting immediate levy in case of jeopardy, see section 6331 (a). (Aug. 16, 1954, c. 736, 68A Stat. 836.)

* * * * * * *

7421. Prohibition of Suits to Restrain Assessment or Collection.

(a) Tax.—Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * * * *

18 USC 2510(7)

§ 2510. Definitions

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

18 U.S.C. 2516(1)

2516. Authorization for interception of wire or oral communications.—(1) The Attorney General, or any Assistant Attorney General specially designated by the Attor-

ney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots) [18 USCS §§ 791-800, 2151-2157, 2381-2391 or 2101, 2102];

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954

(offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping, and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

* * * * * * *

18 USC 2517

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

APPENDIX F

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56 (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Supreme Court, U. S.
FILED
JUL 3 1975
MICHAEL RODAK, JR., CLERK

No. 74-1420

In the Supreme Court of the United States

OCTOBER TERM, 1975

LUTHER ALBERT JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1420

LUTHER ALBERT JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this suit in the United States District Court for the Western District of Kentucky to enjoin the collection of a wagering excise tax assessment of $929,600 for the period July 1, 1968 through September 30, 1972. The district court denied petitioner's motion for a preliminary injunction and granted the government's motion for summary judgment on the ground that the action is prohibited by the Anti-Injunction Act, 26 U.S.C. 7421(a) (Pet. App. A 1a-8a). That Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." The court of appeals affirmed *per curiam* (Pet. App. C 10a-11a).

1. The decision below correctly held that this action is barred by the Anti-Injunction Act. The statutory prohibition on injunctions against tax assessments or collection activities by the Treasury is subject to one narrowly limited exception created by this Court. In *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7, the Court unanimously held that a taxpayer could obtain an injunction only if he satisfied a two-fold test: first, he must show that "it is clear that under no circumstances could the Government ultimately prevail" on the merits of its legal claim; secondly, he must show that "equity jurisdiction otherwise exists" because of the threat of irreparable injury for which there is no adequate legal remedy. Recently, the Court reaffirmed the *Williams Packing* rule and upheld the bar of the Act against injunctive suits in connection with tax-exempt status. See *Bob Jones University* v. *Simon*, 416 U.S. 725; *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752.

Contrary to petitioner's argument (Pet. 6), the decision below is in complete accord with the standard established by *Williams Packing*. Petitioner failed to satisfy the *Williams Packing* test for injunctive relief. With respect to the first part of the two-fold test—that under no circumstances could the government ultimately prevail —petitioner merely alleges that there was no factual foundation for the assessment. However, the assessment was shown to have been based upon (1) petitioner's admission by guilty plea in a related criminal case that he was involved in gambling activities throughout the period of the assessment (Pet. App. A 2a, 6a-7a); and (2) the average daily wagers known to have been placed with petitioner's gambling operation over a nine-day period (Pet. App. A 2a).

The wagering excise tax assessment was calculated by projecting these average daily wagers over the assessment period. This method, necessitated by petitioner's lack of books and records from which the precise amount of the tax due might be computed, has long been held to be appropriate for determining wagering excise tax liability under similar circumstances. See, *e.g.*, *Collins* v. *Daly*, 437 F.2d 736 (C.A. 7); *Pinder* v. *United States*, 330 F.2d 119 (C.A. 5). The fact that petitioner alleges (Pet. 4) that he is unable to pay the total assessment and that collection attempts would result in his bankruptcy is an insufficient basis for his claim for injunctive relief. As the Court stated in *Enochs* v. *Williams Packing Co., supra*, 370 U.S. at 6, "such a suit may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise."

Moreover, unlike the assessment of income, estate and gift taxes which are reviewable in the Tax Court and must be paid in full as a prerequisite to maintaining a suit for refund, the Tax Court has no jurisdiction over assessments of wagering excise taxes. As a result, this Court has held that a suit for a refund of such an excise tax may be maintained with respect to any portion of the assessment because the assessment is "divisible". *Flora* v. *United States*, 362 U.S. 145, 171, n. 37; See also, *Vuin* v. *Burton*, 327 F.2d 967, 970 (C.A. 6). Thus, even if petitioner cannot pay the total assessment, he still has available a judicial remedy based upon payment of part of the assessment. See *Bob Jones University* v. *Simon, supra*, 416 U.S. at 746-748; *Alexander* v. *"Americans United" Inc., supra*, 416 U.S. at 761-762.

2. Contrary to petitioner's contention (Pet. 6-11), the decision below does not conflict with *Pizzarello* v. *United States*, 408 F.2d 579 (C.A. 2); *Lucia* v. *United States*, 474 F.2d 565 (C.A. 5) (*en banc*); or *Shapiro* v. *Secretary of State*, 499 F.2d 527 (C.A. D.C.), certiorari granted *sub nom. Commissioner* v. *Shapiro*, 420 U.S. 923. In *Pizzarello*, the Second Circuit relied upon *Williams Packing* in reversing the denial of an injunction against a gambling excise tax assessment which was based upon a five-year projection of wagering activity during a three-day period. In that case, however, the taxpayer had been indicted for operating a gambling establishment only for two weeks. Because of this obvious disparity in the time periods, the court found no proof in the record that the taxpayer operated as a gambler for five years (408 F.2d at 583). In enjoining the assessment as excessive, the court noted that the allegation that the taxpayer was engaged in gambling activity for five years was "unsupported either by the record or by affidavits" (*id.* at 584).

Petitioner has made no such showing in this case to cast doubt upon the correctness of the assessment, which is presumptively valid. See, *e.g.*, *Lucas* v. *Structural Steel Co.*, 281 U.S. 264, 271; *Wickwire* v. *Reinecke*, 275 U.S. 101, 105; *Welch* v. *Helvering*, 290 U.S. 111, 115. Indeed, unlike *Pizzarello*, petitioner admitted by guilty plea that he was involved in gambling activities throughout the period covered by the assessment. Moreover, in a decision subsequent to *Pizzarello*, the Second Circuit has indicated that injunctive relief cannot be granted where, as here, there is some basis for concluding that the taxpayer was

engaged in gambling activity during the period in question. See, *Hamilton* v. *United States*, 429 F.2d 427 (C.A. 2), affirming, 309 F. Supp. 468 (S.D. N.Y.), certiorari denied, 401 U.S. 913.[1]

Lucia is similarly distinguishable. There, the taxpayer argued on appeal that the district court should not have dismissed his suit because he stood ready to demonstrate the error of a gambling excise tax assessment based upon a projection of wagering activity over four years and eight months. The Fifth Circuit remanded the case to the district court for a factual determination of the taxpayer's claim. Unlike *Lucia*, however, here the district court did not dismiss petitioner's suit but granted the government's motion for summary judgment only after considering the factual foundation for the assessment as set forth in affidavits. Petitioner did not submit any evidence challenging the correctness of the assessment.[2] Nothing in *Lucia* re-

---

[1]Here, the evidence supporting the assessment was obtained through court-approved wiretaps, and the lawfulness of that evidence has been judicially determined in a criminal case involving petitioner. Moreover, petitioner's assertion (Pet. 9) that special agents of the Internal Revenue Service are not permitted to receive evidence obtained by wiretaps has been rejected by the Third Circuit in *United States* v. *Iannelli*, 477 F.2d 999.

[2]Petitioner filed affidavits (R. 81-95) alleging that his guilty plea in the criminal proceedings arising from the same alleged activities was not intended as an admission of guilt, and denying certain facts set forth in the revenue agent's affidavit. He did not, however, deny that he was engaged in gambling during this period, or deny the inferences drawn by the revenue agent with respect to his liability for federal wagering taxes. In challenging (Pet. 9-10) the affidavits filed by the government (R. 34-88) on the ground that they are based on hearsay, petitioner misconceives their purpose. These affidavits were not presented to establish the correctness of the assessment, but simply to show the factual foundation for the assessment, in order to establish that there was a likelihood that the government would prevail on the merits of its claim. "R." references are to the joint appendix in the court of appeals.

quires that petitioner be given another opportunity to retry his suit. Moreover, the Fifth Circuit's more recent decision in *Carson* v. *United States*, 506 F.2d 745, indicates that petitioner's failure to deny that he was engaged in the business of accepting wages is a sufficient ground for distinguishing *Lucia*.[3]

Finally, the decision below does not conflict with *Shapiro* v. *Secretary of State, supra*. Unlike this case, the record in *Shapiro* did not disclose the basis of the assessment and the case was remanded by the court of appeals to allow the district court to develop a record upon which to rule on the government's motion to dismiss. While we believe that *Shapiro* erred in holding that the Commissioner was required to prove the facts upon which his assessment was based before the bar of the Anti-Injunction Act is applicable, the record in this case fully supported the district court's conclusion that petitioner did not demonstrate that "under no circumstances" would the government prevail on the merits of its claim within the meaning of the *Williams Packing* exception.[4]

---

[3]Throughout these civil proceedings petitioner has never denied his gambling activities, but merely stated "he does not admit" these activities (Pet. App. A 3a).

[4]*Hall* v. *United States*, 493 F.2d 1211 (C.A. 6), certiorari granted, 419 U.S. 824, reargument ordered, June 23, 1975, No. 74-75; *Laing* v. *United States*, 496 F.2d 853 (C.A. 2), certiorari granted, 419 U.S. 824, reargument ordered, June 23, 1975, No. 73-1808; and *Rambo* v. *United States*, 492 F.2d 1060 (C.A. 6), petition for certiorari pending, No. 73-2005, cited by petitioner (Pet. 12), are not on point. Those cases present the question whether the Commissioner is required to issue a notice of deficiency to the taxpayer in connection with the termination of a taxable year under Section 6851. Here, the assessment was made in accordance with Section 6862, which permits the Commissioner to make jeopardy assessments of taxes not within the jurisdiction of the Tax Court. A notice of deficiency is not, in any event, required to be issued in connection with assessments of such taxes.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

Supreme Court, U. S.
FILED
SEP 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1420

LUTHER ALBERT JAMES - - - - **Petitioner**

versus

UNITED STATES OF AMERICA - - **Respondent**

RESPONSE BY PETITIONER TO MEMORANDUM FOR UNITED STATES IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Table of Citations	iii
Restatement of Positions	1– 2
Argument	3– 9
I. Neither the Plea of Guilty to the Charge of Conspiracy to Engage in Gambling Activities, Nor the Wiretap Information Obtained by the F.B.I. Can Form a Factual Basis for the Assessment Sought To Be Enjoined Herein	3– 7
A. The Plea of Guilty	3– 4
B. Wiretap Information	5– 7
II. The Combined Facts of Petitioner's Plea of Guilty to Conspiracy and the Government's Wiretap Information Do Not Distinguish the Present case From *Pizzarello, Lucia,* and *Shapiro, infra*	7– 9
Conclusion	10
Supplemental Appendix A	11–14
Supplemental Appendix B	15

TABLE OF CITATIONS

Cases: PAGE

Carson v. United States, 506 F. 2d 745 (C.A. 5 1974) 9

Hamilton v. United States, 429 F. 2d 427 (C.A. 2 1970) 9

James v. McKeever, 73-2 U.S.T.C. ¶16,119, (D. Ariz. 1973) 6–7

Lucia v. United States, 474 F. 2d 565 (C.A. 5 1973) (en banc) 2, 7, 8

North Carolina v. Alford, 400 U. S. 25 (1970)..... 3–4

Pizzarello v. United States, 408 F. 2d 579 (C.A. 2 1969), cert. denied 396 U. S. 986 (1969).....2, 7–8

Shapiro v. Secretary of State, 499 F. 2d 527 (C.A. D.C. 1974), certiorari granted *sub nom.* Commissioner v. Shapiro, 420 U. S. 923..... 2, 7

United States v. James, Crim. No. 27962 (W.D. Ky. 1973) 3

Statutes:

18 U.S.C. §2510-2518..... 5

18 U.S.C. §2517(1)..... 6

18 U.S.C. §2510(7)..... 6

18 U.S.C. §2515(1)..... 7

Rules:

56(e) of the Federal Rules of Civil Procedure..... 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1420

LUTHER ALBERT JAMES - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

RESPONSE BY PETITIONER TO MEMORANDUM FOR UNITED STATES IN OPPOSITION

RESTATEMENT OF POSITIONS

In his petition, Luther Albert James, contends that this Court should issue a Writ of Certiorari for the following reasons: (a) That he is entitled to enjoin a $926,000.00 excise tax assessment against him because the assessment is arbitrary and without factual foundation, and (b) the decision of the Court of Appeals for the Sixth Circuit in refusing to grant petitioner injunctive relief, or, in the alternative, requiring the District Court to hold an evidentiary hearing on the aforesaid jeopardy assessment conflicted with precedent established in the Second, Fifth and District of Columbia Circuits on similar allegations and facts.

In its Memorandum in Opposition, the United States contends: (a) That the Internal Revenue Service was entitled to rely on petitioner's plea of guilty to the charge of conspiracy to engage in gambling and on certain alleged information of gambling activity obtained by an FBI agent over a period of nine days during a telephone wiretap conducted in Louisville, Kentucky prior to the assessment and (b) that the claim for injunctive relief by Petitioner is distinguishable in its facts from the cases of *Pizzarello* v. *United States,* 408 F. 2d 579 (C.A. 2 1969), cert. denied 396 U. S. 986 (1969); *Lucia* v. *United States,* 474 F. 2d 565 (C.A. 5 1973) (en banc), and *Shapiro* v. *Secretary of State,* 499 F. 2d 527 (C.A. D.C. 1974), certiorari granted *sub nom. Commissioner* v. *Shapiro,* 420 U. S. 923.

ARGUMENT

The following reply is directed solely to the contentions raised by the United States in its Memorandum in Opposition.

I. Neither the Plea of Guilty to the Charge of Conspiracy to Engage in Gambling Activities, Nor the Wiretap Information Obtained by the F.B.I. Can Form a Factual Basis for the Assessment Sought To Be Enjoined Herein.

A. THE PLEA OF GUILTY

1. On October 29, 1973, in the United States District Court for the Western District of Kentucky, petitioner, pursuant to plea negotiations, entered a plea of guilty to the charge that he conspired to engage

in gambling activities during a period from April 17, 1972, to May 26, 1972. The plea was specifically tendered and entered pursuant to the authority granted by this Court in *North Carolina* v. *Alford,* 400 U. S. 25 (1970), because it was "the most expedient thing . . . to do and not because . . . (Petitioner was) guilty of the charge." The Trial Judge, Honorable Rhodes Bratcher, accepted the plea with that explicit understanding (*United States* v. *James,* Crim. No. 27962 (W.D. Ky. 1973) (Transcript of Excerpt from the proceedings on November 2, 1973) (Supplemental Appendix A, pp. 11-14).

This Court, in *Alford, supra,* enunciated that although most guilty pleas constitute both a waiver of trial and an express admission of guilt, the latter element was not mandated by the Constitution as a prerequisite to the imposition of sentence. This Court recognized that a voluntary guilty plea represents an intelligent choice by the defendant to pursue a course of action which he considers to be in his best interest.

After discussing several *nolo contendere* decisions, this Court, in *Alford, supra,* then added that:

> (t)he fact that (Alford's) plea was denominated a plea of guilty rather than a plea of nolo contendere is of no constitutional significance with respect to the issue now before us, for the Constitution is concerned with the practical consequences not the formal categorizations, of state law.

Thus, in *Alford, supra,* the defendant's guilty plea coupled with the protestation of innocence was deemed

to have the same effect before the law as a plea of *nolo contendere* and cannot be used to aid the proof of guilt in another proceeding.

2. Assuming *arguendo* that the plea of guilty constituted information that the petitioner engaged in illegal gambling activities, even so it could have no bearing on any part of the 51 month assessment period except from April 7 to May 26, 1972.

The United States, on pages 2 and 4 of its Memorandum in Opposition, has directly misstated to this Court that:

> "Petitioner's admission by guilty plea in a related criminal case that he was involved in gambling activities *thoroughout the period of the assessment* . . . (supported the assessment") (page 2)
> and
> "Indeed, unlike *Pizzarello,* petitioner admitted by guilty plea that he was involved in gambling activities *throughout the period covered by the assessment.*" (Emphasis added.) (page 4)

Such misstatements of fact are clearly inappropriate in opposition to the present Petition for Writ of Certiorari.

B. WIRETAP INFORMATION

Again, the United States has on page 2 of its Memorandum in Opposition misstated a material fact in support of an untenable argument in contending:

> "However, the assessment was shown to have been based upon . . . (2) the average daily wagers *known to have been placed* with petitioner's gambling operations over a nine day period (Pet. App. 2 a)." (Emphasis added.)

Petitioner's objection to the above statement is two-fold: First, as shown by the record of proceedings of the District Court, the present assessment was made by IRS agent James D. Morgan. It was based substantially, if not wholly, upon an affidavit of F.B.I. agent Anthony Adamski which concerned several wiretap interceptions carried on by the F.B.I. in which Petitioner allegedly participated. The affidavit, rather than purporting to relate actual conversations involving the Petitioner, merely contained conclusary and hearsay statements which, pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, were inadmissible to support a Motion for Summary Judgment in the District Court.

Secondly, and more importantly, the wiretap information cannot be used by the Internal Revenue Service *for any purposes* in the present assessment even though it in fact covered nine days out of a total 51 month assessment period. The wiretapping, through which the United States allegedly obtained information, was supposedly authorized pursuant to Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 USC § 2510-18 (1970), in connection with an investigation by the F.B.I. into suspected violation of the gambling laws of the United States. However, evidence derived by use of such wiretaps, or the fruits thereof, cannot be employed against petitioner to sup-

port the present assessment because such use violates Congressional policy enunciated in 18 USC § 2517(1) (Petitioner's Appendix E, p. 19a) and also violates petitioner's constitutional right to privacy.

In order to effectively protect an individual's right to privacy, 18 USC § 2517(1) provides:

> Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

The definitional provision of Title III defines "investigative or law enforcement officer" as:

> . . . any officer of the United States or of a State or political subdivision thereof, *who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter* . . . (18 USC § 2510(7) (1970)). (Petitioner's Appendix E, p. 17a.) (Emphasis added.)

An agent of the Internal Revenue Service is *not* authorized to receive or use any information derived from use of electronic surveillance conducted under the authority of Title III. Directly on the point is the case of *James* v. *McKeever,* 73-2 U.S.T.C. ¶ 16,119 (D. Ariz. 1973), wherein the Court granted a motion to suppress evidence derived by the I.R.S. from wire-

taps conducted by the local police, on the ground that I.R.S. agents are not authorized to receive such information pursuant to 18 USC § 2515(1), which provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . before any court . . . if a disclosure of that information would be in violation of this chapter. (18 USC § 2515.) (Supplemental Appendix B, p. 15.)

Summarizing Petitioner's contentions on the issue of wiretap information:

(a) The information itself did not disclose that Petitioner was engaged in illegal gambling activities; (b) the information concerned at best only a period of nine days out of a total of 51 months (or 1,328 days) and (c) I.R.S. could not use such information in any civil tax proceeding against Petitioner from which it could form any basis upon which an assessment could be made.

II. The Combined Facts of Petitioner's Plea of Guilty to Conspiracy and the Government's Wiretap Information Do Not Distinguish the Present Case From *Pizzarello, Lucia* and *Shapiro, Supra.*

Like Petitioner herein, Pizzarello had, prior to the assessment, been found guilty of the charge that he engaged in illegal gambling activities for a two week period named in a criminal indictment. The Second

Circuit, in reversing a dismissal of Pizzarello's Petition for Injunctive Relief, gave no weight to the criminal conviction either as substantive information of gambling activities or factual proof of those activities because the conviction was based on admissible evidence of only three days activities over the entire assessment period of five years.

In *Pizzarello,* as with the case at bar, the government had attempted to use illegally obtained evidence in the criminal proceeding to support the excise tax assessment. The Second Circuit held that if the evidence was not admissible because it was illegally obtained, it could not form a factual foundation for the assessment. In the case of Luther Albert James, the United States is relying on inadmissible and unconstitutionally obtained evidence and information about the activities of James over a period not in excess of nine days. In both *Pizzarello* and the present case, the bulk of the government's information was obtained either by reason of it being illegally seized or by reason of it being used in violation of the aforementioned statutory prohibitions.

Petitioner has previously indicated his strong reliance upon the Fifth Circuit's *en banc* decision in *Lucia, supra.* The facts indicate that Lucia had pled guilty to a criminal information which had charged him with conspiracy to willfully fail to pay excise tax on wagers for a period of March 1, 1959-January 31, 1964 (a period of time *in excess of the assessment period*). The excise tax assessment was based on uncontroverted proof of acceptance of wagers by Lucia

on one day and projected throughout the assessment period of March 1, 1959-November 21, 1963.

The Court of Appeals for the Fifth Circuit sustained Lucia's contention that his Petition for Injunctive Relief stated a cause of action, in spite of the anti-injunction statute, based on the obvious lack of factual foundation that Lucia had, in fact, engaged in illegal gambling activities over the entire period of the assessment. This result was reached notwithstanding the fact that Lúcia, at no place in his pleadings, alleged that he was not engaged in illegal gambling activities.

The recent case of *Carson* v. *United States,* 506 F. 2d 745 (C.A. 5 1974), discussed the effect of the failure to deny engaging in gambling activities in suits for injunctive relief. It is urged the Carson Court erroneously credited Lucia with having made a sworn denial that he was engaged in gambling activities. A review of the Lucia pleadings indicate that there was no such denial.

The fact that Petitioner does not admit engaging in gambling activities distinguishes his case from *Hamilton* v. *United States,* 429 F. 2d 427 (C.A. 2 1970), strongly relied on by Respondent, where the opinion noted that Hamilton admitted he owed a tax, but attempted only to dispute the amount through injunctive relief.

CONCLUSION

For the reasons stated herein and in the original Brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPPLEMENTAL APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

United States of America v. Luther A. James, et al.	Indictment No. 27962

TRANSCRIPT OF EXCERPT FROM THE PROCEEDINGS

Before Honorable Rhodes Bratcher, United States District Judge Western District of Kentucky, at Louisville, Kentucky, commencing October 29, 1973, and ending November 10, 1973, without a jury.

Appearances:

For the United States of America
David Martin, Esquire
James E. Kelley, Jr., Esquire

For the Defendants
Frank E. Haddad, Jr., Esquire
Don Major, Esquire
Stuart Lyon, Esquire
Gary Gardner, Esquire
J. Tim McCall, Esquire
Larry B. Franklin, Esquire
Henry Hughes, Esquire
Dudley Webb, Esquire

Transcript of Excerpt from the Proceedings

The following proceedings occurred in the Court's Chambers at about the hour of 1:45 P.M. on Friday, November 2, 1973, with all Defendants and their respective Counsel together with Counsel for the Government, being present:

Mr. Haddad: For the record, if Your Honor please, on behalf of Luther James, Sam Marrillia and Frank Gaines, they wish at this time to withdraw their plea of not guilty entered to Count II of the indictment and to enter a plea of guilty to Count II, which is the conspiracy count in this indictment.

By the Court: Now, wait a minute here. Now, Frank, you represent which ones now?

Mr. Haddad: Luther James, Sam Marrillia and Frank Gaines.

By the Court: All right. Now what about the others?

Mr. Gardner: Your Honor, on behalf of Raymond Coy—

By the Court: All right. Gardner—Coy?

Mr. Gardner: Yes, sir; and Donald Joseph Hanka—

By the Court: (Interrupting) All right.

Mr. Gardner: (Continuing)—same motion.

By the Court: All right. Now, which other lawyers—

Mr. Haddad: (Interrupting) That's all five of them.

By the Court: Five?

Mr. Gardner: There will be a subsequent motion on another defendant.

By the Court: Oh, yeah. Bird?

Mr. Gardner: Yes, sir.

By the Court: All right. Now, you've indicated that you join with Mr. Haddad in the same motion?

Mr. Gardner: Yes, Your Honor.

By the Court: Now, Mr. James, you've heard the statement made by your attorney?

Mr. James: Yes, sir.

Transcript of Excerpt from the Proceedings

By the Court: You have had adequate opportunity to discuss this matter thoroughly and in detail with your attorney?

Mr. James: Yes, sir.

By the Court: And ask him any questions that you wanted to, desired to, in this case concerning all aspects of it?

Mr. James: Yes, Your Honor.

By the Court: Does he express your wishes concerning the change of your plea?

Mr. James: Yes, sir.

By the Court: You do want to plead guilty?

Mr. James: To the conspiracy.

By the Court: Yes. This is the same understanding, isn't it, as to the dismissal of—

Mr. Martin: (Interrupting) Yes, sir.

By the Court: (Continuing)—of Count I-

Mr. Martin: That is correct, Your Honor.

Mr. Haddad: Yes, sir. These defendants, too, Your Honor, I might add, are all entering this plea pursuant to the authority granted in the Supreme Court in the Alford case because it's the most expedient thing for them to do and not because they're guilty of the charge.

By the Court: (To the Clerk of the Court) Do you have that? All right.

Mr. Gardner: For all defendants, Your Honor.

By the Court: All right. Now, are each of you aware that is the strict prerogative of the Court to pronounce sentence in this case?

(Whereupon, all defendants indicate affirmatively.)

By the Court: And that I am not necessarily bound by the recommendation of the United States Attorney or of your attorneys or anything; it's my exclusive province to strictly pronouce the sentence and determine the sentence?

Transcript of Excerpt from the Proceedings

(Whereupon, all defendants indicate affirmatively.)

By the Court: Are each of you aware that on this count, which is the conspiracy count, No. II, Count II of this indictment, that each of you could receive as much as $10,000.00—up to $10,000.00 in fines and up to five years in the penitentiary or both in the discretion of the Court?

(Whereupon, all defendants indicate affirmatively.)

By the Court: With that information and with that knowledge, it's still your desire to plead guilty?

(Whereupon, all defendants indicate affirmatively.)

By the Court: All right. Let their pleas be changed. I'll accept their change of plea.

(End of excerpt.)

CERTIFICATE

I, Marion D. Odle, Official Court Reporter, United States District Court, Western District of Kentucky, Louisville, Kentucky, hereby certify that the entire proceedings in the captioned case were taken down by me at the time and place stated in the caption; that the foregoing "Transcript of Excerpt from the Proceedings" is a true and accurate transcript of my stenographic notes so taken; that said transcript was prepared under my supervision and direction.

I further certify that I am not related by blood or marriage to any of the parties hereto and that I have no interest in the outcome of captioned case.

Given under my hand as Official Court Reporter this the 18th day of February, 1974, at Louisville, Kentucky.

(s) Marion D. Odle
Official Court Reporter

SUPPLEMENTAL APPENDIX B

TITLE 18, UNITED STATES CODE (1970)

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof if the disclosure of that information would be in violation of this chapter.